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Brief and Argument on behalf of Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 180.

A. C. FINNEY, as Receiver, et al.,

Plaintiff in Error,

vs.

MARY A. GUY, Etc.,

Defendant in Error.

IN ERROR TO SUPREME COURT OF WISCONSIN.

ROBERT M. BASHFORD,

Attorney for Defendant in Error.

MADISON, WISCONSIN.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 180.

A. C. FINNEY, et al., PLAINTIFF IN ERROR,

vs.

MARY A. GUY, DEFENDANT IN ERROR.

IN ERROR TO SUPREME COURT OF WISCONSIN.

Brief and Argument on behalf of Defendant in Error.

Plaintiffs in error upon filing in this court the writ of error from the Supreme Court of Wisconsin applied for a writ of certiorari to secure further return, which application was granted. The defendant in error at the same time submitted a motion to dismiss the appeal or to affirm the judgment upon the ground that no Federal question was necessarily involved. This motion was denied without prejudice, and has since been renewed to be argued at the time of the hearing of the cause upon its merits. In support of this motion counsel for defendant in error submits the brief filed herein in support of the original motion and the further points and authorities herein contained. Counsel for plaintiffs in error in his brief upon the merits has argued the question of jurisdiction, and this court might dismiss the appeal or affirm the judgment if of the opinion that no Federal question was necessarily involved although there had been no renewal of the motion by the defendant in error.

Hale v. Lewis, 181 U. S. 473, contains an intimation that the proper practice is for the defendant to move to

dismiss the appeal upon the ground that no Federal question is involved and that rule has been complied with by the motion here submitted. It is to be observed, however, that no such motion was made in that case, but as the question was argued by counsel on both sides, as in this case, the court considered the question and dismissed the appeal.

I.

No Federal Right Involved.

The matter decided by the Supreme Court of Wisconsin was one of state rule and practice, and if a Federal question was involved at all it was only incidental to a determination of the local question of what the state procedure required. *Miller's Executors v. Swan*, 150 U. S. 132, 137.

When the Supreme Court is of the opinion that the Federal question was erroneously decided, it will still affirm the judgment, if it appears upon another ground, even if such ground was not considered by the state court, the decision was correct. *Murdock v. Memphis*, 20 Wall. 590, 636.

If a Federal question was presented to the Supreme Court of Wisconsin, it must have been disclosed by the record on appeal. As shown by a reference to the statutes and decisions of Wisconsin upon the former brief this record consists of the judgment roll, to-wit: the summons and complaint, the proof of service thereof, the demurrer the order sustaining the demurrer, and the judgment. The statements of the trial judge, or the arguments of counsel, or the exceptions to the rulings of the court are no part of this record. This sufficiently appears by the decision of the Supreme Court of Wisconsin on the last appeal, the opinion of Mr. Justice Dodge. (Tran. p. 62.)

Zadig v. Baldwin, 166 U. S. 485, is authority for the statement that the brief and argument of counsel are not sufficient to raise a Federal question. Nor can the certificate of the Chief Justice that upon the argument a Federal right was drawn in question supply the omission. *Yazoo & Miss. R. R. Co. v. Adams*, 180 U. S. 41, 48.

"If it appear from the record upon clear and necessary intendment that a Federal question must have been directly involved, so that the state court could not have given judgment without deciding it that will be sufficient; but resort cannot be had to the expedient of importing into the record the legislation of the state as judicially known to the courts, and holding the validity of such legislation to have been drawn in question, and decision necessarily rendered thereon in arriving at conclusions upon the matters actually presented and considered." *Powell v. Brunswick County*, 150 U. S. 433, 440.

In New Orleans Water Works Co. v. Louisiana, 185 U. S. 336, it is said (p. 344): "It has long been the holding of this court that in order to warrant the exercise of jurisdiction over the judgments of state courts there must be something more than a mere claim that a Federal question exists. There must, in addition to the simple setting up of the claim, be some color therefor, or, in other words, the claim must be of such a character that its mere mention does not show it destitute of merit; there must be some fair ground for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up."

An examination of the grounds of demurrer will support the conclusion that a Federal right was not necessarily involved in the judgment of the court dismissing the action.

Counsel for plaintiffs in error, on page 11 of his brief, assumes that the demurrer admits not only the facts set out in the complaint but the legal conclusions drawn therefrom by the pleader. Such is not the rule in Wisconsin or in other code states. While a demurrer admits traversable facts it does not admit inferences drawn from them or conclusions of law. *State v. Veeder*, 5 Wis. 339; *Brown v. Phillips*, 71 Wis. 239; *Stedman v. Berlin*, 97 Wis. 605; 6 *Ency. of Plead. & Practice* 336.

The same rule has been stated and followed by this court. *Fogg v. Blair*, 139 U. S. 118, 127; *Kent v. Lake Superior Ship, etc. Co.*, 144 U. S. 75, 91.

The demurrer therefore admits the existence of the decisions and statutes of Minnesota specifically referred to in the complaint, but it does not admit the interpretation

placed upon the law of Minnesota by the pleader or his legal conclusions therefrom. The Supreme Court of Wisconsin was called upon to give consideration to those statutes and decisions and reach its own conclusions as to their import.

We shall now consider the grounds of demurrer so far as we deem them material on this hearing, and endeavor to show that no Federal right was necessarily involved, but that if the question was presented it was correctly decided. The argument will therefore have a bearing upon this motion and upon the merits of the cause.

The contention is made by the counsel for plaintiffs in his brief (p. 28) that after the first decision of the Supreme Court of Wisconsin applications were made to the Circuit Court for leave to amend the complaint by inserting an averment which specificaly presented the Federal question and that the applications were denied. It is admitted, however, that no appeal has ever been taken from either of of those orders, nor were they brought before the Supreme Court for review upon appeal from the final judgment as they might have been under the Wisconsin practice. Wisconsin Statutes 1898 § 3069 provide that an appeal to the Supreme Court may be taken from an order affecting a substantial right in any action, etc.; and § 3070 provides that on appeal from a judgment the Supreme Court may review any intermediate order or determination of the court below which involves the merits and necessarily affects the judgment appearing upon the record returned from the trial court whether excepted to or not. As shown by the brief filed on behalf of the defendant in opposition to the motion for writ of certiorari the applications to amend and the orders denying the same were not parts of the record transmitted to the Supreme Court, and they could not therefore have been considered on the last appeal. Such an order and the matter upon which it is founded does not become a part of the record and cannot be reviewed on appeal from the judgment unless incorporated in a bill of exceptions. *Keller v. Gilman*, 96 Wis, 445. The applications referred to and the orders denying the same instead of establishing the fact that a Federal question was presented should, on the contrary, be treated as *res adjudicata* and as a

waiver or estoppel on the part of the plaintiffs to assert that any such right was necessarily involved. *Hooker v. Brandon*, 66 Wis. 498; *id.*, 75 Wis. 8; *McKenon v. Wolfender*, 78 Wis. 237; *Ray v. Hixon*, 90 Wis. 39; *Keller v. Town of Gilman*, 96 Wis. 445.

The grounds of the demurrer of Mary A. Guy and of Mary A. Guy as executrix, etc., are substantially the same and are, so far as material for consideration here as follows: 1. That the Circuit Court of Pierce County had no jurisdiction of the subject matter. 2. That the plaintiffs have not the legal capacity to sue. 3. That several causes of action have been improperly united. 4. That the action was not commenced within the time limited by law. 5. That the complaint does not state facts sufficient to constitute a cause of action. The discussion of the first four grounds separately will have a direct bearing upon the sufficiency of the complaint considered under the last head.

II.

The Wisconsin Court had no Jurisdiction of the Subject Matter of the Action.

This a suit to enforce the liability of a stockholder in a bank created by the law of Minnesota, and not an action to collect a judgment rendered by a court of that state against the defendant in error. No judgment has been entered against her, or in an action to which she was actually a party personally or in her representative capacity.

It is alleged in the complaint that an action was brought in the Minnesota court in 1894 to enforce the statutory liability of the stockholders of the bank by one creditor suing in behalf of himself and of all the other creditors against the insolvent bank, "and that all the stockholders of said bank were named as parties defendants therein." (Trans. p. 25.) The stockholders as named in the complaint in that action included the name of Mary A. Guy as the holder of three shares of stock, and of Charles V. Guy as the holder of sixteen shares, although it is admitted

that the latter departed this life October 28, 1892. (Trans. p. 21.) Mary A. Guy as residuary legatee was not named as a party, but this point will be noticed under the head of misjoinder. Provision was made in the judgment for the appointment of a receiver (Trans. p. 29), and an order was subsequently entered appointing A. C. Finney, and authorizing him to bring suit in other jurisdictions "in which any of the above named defendant stockholders reside, who are non-residents of the state" for the purpose of enforcing in such jurisdiction "the liability of such parties respectively as stockholders in said Farmers & Merchants Bank to double the amount of stock held by said parties respectively in said bank." (Trans. p. 31.)

The only judgment entered against any person was against the resident stockholders of the bank in the amounts stated in the complaint. (Trans. p. 26.) It is true that this judgment undertook to determine the amount of the indebtedness of the bank, the creditors and the sum due to each, and the stockholders and the amount of their respective subscriptions, but the adjudication with respect to those matters is not material to the question here under consideration.

The nature of the statutory liability of stockholders under the laws of Minnesota and the laws of Wisconsin, which are substantially the same, is fully considered by the Supreme Court of Wisconsin in the decision in this case, 106 Wis. 256, (Trans. p. 43) where the authorities are referred to at length. It is a limited, joint and several liability, which attaches at the time the debt is contracted, in favor of the creditors and against the stockholders to be enforced by a suit in equity brought by one creditor in behalf of himself and all other creditors against all the stockholders. The statute creates the liability and provides the remedy, and while it is immediate and direct and contractual in character, it is not transitory and cannot be enforced in a foreign jurisdiction, unless the procedure can there be applied, and without prejudice to resident stockholders.

The liability is limited to the amount of stock held at the time the suit is brought. It is several in the sense that it is unequal although there can be no judgment *in solido*

against any shareholder. It is joint in the sense that a solvent shareholder is liable up to the amount of his stock and beyond his ratable portion to pay the share of an insolvent stockholder, for which he may have contribution against other solvent members; and it is joint as to procedure, as all the solvent stockholders must be joined in an action to enforce such liability. There is a distinction to be here noted between the liability of a stockholder in a national bank and in a state bank under the Wisconsin and Minnesota statutes. Under the National Banking Act (§ 5151 R. S. U S.), shareholders are individually responsible equally and ratably, and not one for another, for the debts of a national bank. Each shareholder is therefore liable to contribute such share of the whole indebtedness as his stock bears to the total capital stock. That amount cannot be increased by reason of the insolvency of other stockholders. *United States v. Knox*, 102 U. S. 422. This distinction is noted in *Rehbein v. Rahr*, 109 Wis. 136, 150. This furnishes a further ground for holding that the procedure must be joint, and that all stockholders must be parties to the suit.

It may be as well here to note also the distinction between the liability created by the laws of Minnesota and Wisconsin and that created by the Kansas constitution and statutes. Counsel for plaintiffs in error relies largely upon decisions construing the Kansas law to support this suit. He cities *Whitman v. Bank*, 176 U. S. 559, which enforces the liability of a stockholder in a Kansas corporation. In the opinion (p. 566) reference is made to *Plumb v. Bank*, 48 Kan. 484, 486, where it is said: "Under our constitution and statutes, the individual liability stands as a sort of surety for the corporate liability," etc. The liability created by the Kansas law is not that of a surety who may be sued in the same action with the principal debtor, but is more in the nature of the liability of a guarantor for collection. He can only be sued after the creditor has exhausted his remedy against the principal debtor. It is plain that under the Kansas law the liability is not only contractural but is also transitory, as any creditor can sue any shareholder after exhausting his remedy against the corporation. This appears from the decision of this court

in the Whitman case, and subsequent decisions relating to the liability of stockholders in Kansas corporations, and is emphasized by the decisions in New York, Massachusetts and Illinois upon the same subject.

Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, holds that the provisions of the Kansas law give a special remedy against stockholders, which can not be enforced in New York. The Supreme Courts of Massachusetts and Illinois held to a different rule upon the ground that the nature of this liability was as above stated and the action transitory.

Bank v. Ellis, 172 Mass. 39, 51 N. E. 207, sustains an action by a creditor against a stockholder in a Kansas corporation on the ground that the action is transitory by reason of the liability there created. In the opinion it is said (p. 210): "This court has many times decided that the statutes of other states creating the liability of stockholders to creditors of a corporation which provide for a suit of a special kind, to which the corporation and all stockholders are to be made parties, will not in general be enforced by the courts of this state. It often happens that the courts of this state could acquire no jurisdiction over the corporation, which is a necessary party, or over many of the stockholders; and the suit itself is sometimes of a kind unknown to our laws. The proper courts of the state under whose laws the corporation is established have full jurisdiction over the corporation. Whether in such a suit such courts can acquire jurisdiction over all the stockholders, wherever they reside, in order to determine their liability under the statutes to which they may be held to have assented in becoming stockholders, it is unnecessary now to consider. . . . The special remedy provided by the statutes must be pursued, and as the statutes of a state have no force, *ex propria vigore*, beyond the territorial limits of the state, the remedy usually must be pursued in the state where the corporation has been established and the statutes passed," citing Massachusetts decisions in support of this proposition and *May v. Black*, 77 Wis. 107. In conclusion the court states that the liability created under the Kansas law was intended to be of such a nature that it might be brought in any court of general jurisdiction over similar actions in any state or country where service ac-

cording to the laws of that state or country could be made upon a stockholder.

Bell v. Farwell, 176 Ill. 489, 52 N. E. 346, adopts the same view with respect to the liability of a stockholder in a Kansas corporation by reason of the nature of the liability there created, distinguishing *Tuttle v. Bank*, 161 Ill. 497, 44 N. E. 984, in which it was held that the liability of a stockholder created by the laws of another state containing a special remedy could not be enforced in a foreign jurisdiction. Those decisions and the cases of *Young v. Farwell*, 139 Ill. 326, and *Patterson v. Lynde*, 112 Ill. 196, cited therein emphasize the proposition that the nature of the liability alone, being in favor of any creditor against any stockholder and similar to that of a surety or guarantor, makes the action transitory and enforcible in a foreign jurisdiction.

This court has not, nor have the courts above referred to overruled decisions holding that where a special remedy is provided, and especially if it contemplates a joint action in favor of all creditors against all stockholders, it can be enforced only in the courts of the state which creates the liability and where the corporation is organized to carry on business.

In *Pollard v. Bailey*, 87 U. S. 520, 527, it is said: "The liability and the remedy were created by the same statute. This being so the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common law action."

May v. Black, 77 Wis. 102, cited in the Massachusetts decision, holds that the liability created by the statute of another state will be enforced against a resident stockholder of Wisconsin only when the remedy provided for that purpose may be properly enforced by the courts of the state without prejudice to its own citizens. A doctrine which is approved by the same court in the decision of the case at bar.

In *Fourth National Bank v. Francklyn*, 120 U. S. 747, it is said: "Where the statutes of the state which creates a corporation, making the stockholders liable for the corporate debts, provide a special remedy, the liability of a stock-

holder can be enforced in no other manner." The same doctrine is stated in *Pollard v. Bailey*, 20 Wall. 520.

Mr. Thompson in his Commentaries on the Law of Corporations discusses the statutory liability and its enforcement at considerable length. He says (§ 3055): "We may, then, collect considerable judicial authority to the effect that where the statute governing the corporation creates an individual liability on the part of its stockholders for its debts, and prescribes a remedy to enforce the same by a suit in equity brought on behalf of all the creditors in which the corporation itself and all the stockholders within reach of the process of the court are made parties, no separate action of any sort, whether at law or in equity, can be maintained, in a state other than that of the domicile of the corporation, against any of its stockholders, however numerous, to charge them with such individual liability. The Supreme Judicial Court of Massachusetts has finally settled upon this doctrine, and has reaffirmed it in recent cases in the following language: 'This court does not take jurisdiction of a suit to enforce this liability of stockholders in a foreign corporation, not because it would be a suit to impose a penalty, or a suit opposed to the policy of our laws, but it is a suit against a foreign corporation which involves the relation between it and its stockholders, and in which complete justice can be done only by the courts of the jurisdiction where the corporation was created.'"

The courts of Minnesota have enforced the statutory liability there created within their own jurisdiction, but they have not enforced a statutory liability created by the legislature of another state against citizens of their own state, or even the common law liability of the stockholders of a foreign corporation, resident in that state.

First National Bank v. Gustin, etc., Mining Co., 42 Minn., 327, was a suit to enforce the liability of a stockholder in a foreign corporation for unpaid subscriptions, and it was there held that the remedy was governed by the law of the forum and that the liability could not be enforced in that state for reasons stated.

Rule v. Omega S. & G. Co., 64 Minn., 326, was a suit by a creditor of an insolvent foreign corporation to enforce the

common law liability of a stockholder. It was there held that the remedy provided by the Minnesota statute was not applicable where it was sought to reach such unpaid subscriptions to the stock of a foreign corporation.

The doctrine with respect to the nature of the statutory liability and the remedy for its enforcement as stated in the authorities above cited was announced by the Supreme Court of Minnesota in *Allen v. Walsh*, 25 Minn. 543, decided in 1879, and stood as the rule of law affecting property rights of stockholders in corporations of that state until long after the Farmers & Merchants State Bank was organized, after the stock had been subscribed for, after the debts had all been contracted, after its affairs had been wound up, and until after this suit was commenced to enforce this statutory liability of the stockholders. It was distinctly held in *Allen v. Walsh* (p. 552) that this liability "is purely a statutory one. It arose out of no contract between the parties, other than that implied by the statute, and it is for no debt contracted by the defendant, either as principal or surety; it exists wholly by force of the provisions of the statute which created it, and which alone determines its characteristics and incidents." It is a liability of all the stockholders to all the creditors of the bank. It is further held (p. 553) that the extent of the liability is limited to the amount of the stock held by the stockholders, "though within this limit it is an absolute and unconditional one, which attaches immediately upon the creation of the corporate debt, for which he is answerable to the creditor as upon an original indebtedness." Being created for the benefit of all the creditors, if the bank is insolvent they have a right to participate in proportion to the amount of their claims in whatever proceeds may be realized from the total liabilities, "As between the bank and its stockholders, the former stands in the position of the principal debtor, primarily responsible for the corporate debts, and liable to reimburse the latter for any payments made by them upon account of its obligations. As between the stockholders themselves, the equitable right of contribution exists," etc. The remedy there prescribed is by a single action in which all the creditors shall be joined or represented against all the

stockholders. The doctrine stated in the foregoing decision is fully supported by other Minnesota decisions, but is attempted to be qualified by the case of *Hanson v. Davison*, decided July 26, 1898, 73 Minn. 454, 76 N. W. 254. There is a very able dissenting opinion by Mr. Justice Canty in which reference is made to the former decisions of the Supreme Court of Minnesota, and the decisions of other courts supporting the doctrine of *Allen v. Walsh*. The Minnesota decisions are also reviewed by Mr. Justice Marshall in the opinion upon the first appeal. (Trans. p. 45.)

Hanson v. Davison, 73 Minn. 454, furnishes counsel for plaintiffs in error the only ground for the contention that the courts of Wisconsin have denied a Federal right in dismissing this suit. That was an action to enforce the statutory liability of a stockholder in a Minnesota corporation against a non-resident who had property in the state, and it was held that a separate action could not be maintained as the property could be sequestered in the original suit. With respect to that case it is to be observed that the property of the defendant situated in Minnesota had been attached, and the defendant had appeared in the action. It was there held that while the liability was several the stockholders might, and upon equitable grounds ought to be joined in one action for its enforcement. The remedy is therefore joint as to procedure. It is not a liability that can be enforced by one creditor against any single stockholder. However, it is said an ancillary proceeding may be instituted to reach the property of the stockholder which has been discovered subsequent to the decree. This, of course, has reference to property situated within the jurisdiction. The court say in the opinion that there is no difference in principle between an action to enforce unpaid subscriptions and one to enforce a stockholder's liability, and that a judgment against the corporation is an individual judgment against the stockholders in their corporate capacity. This overlooks entirely the distinction with respect to the two liabilities recognized by all the courts including that of Minnesota in numerous decisions. The unpaid subscription is an obligation arising from contract and must be recovered in the right of the corporation. *Gager v. Paul*, 111 Wis. 638. The statutory liability can-

not be enforced by the corporation or through its right or by its assignee or receiver. It is an obligation of the stockholders to the creditors, and must be enforced for the benefit of the latter in a proper proceeding instituted for that purpose, to which all the stockholders and creditors must be made parties as shown by the authorities cited and in the decision of this case by the Supreme Court of Wisconsin. To the same effect is *Coleman v. White*, 14 Wis. 700; *Gager v. Marsden*, 101 Wis. 598; *Booth v. Dear*, 96 Wis. 516; *Terry v. Little*, 101 U. S. 216.

The judgment fixing the liability of stockholders in the Minnesota court was entered April 28, 1897 (Trans. p. 26), more than a year prior to the decision of *Hanson v. Davison*. The Supreme Court of Wisconsin in holding that the rights of the defendant were to be determined by the state of the law as construed by the highest court of Minnesota at the time the contract was entered into, and the liability became fixed is supported by repeated decisions of this court. The rights of the creditors and stockholders had been finally determined by that judgment under the statutes and decisions of the Supreme Court of Minnesota, then existing, and the obligations of the stockholders could not thereafter be enlarged by a subsequent decision in another cause by the Supreme Court of Minnesota construing this statute.

The settled construction of a statute, so far as contract rights thereunder are acquired, is as much a part of the statute as the text itself, and a change of decision is the same in its effect on pre-existing contracts as a repeal or an amendment of a legislative enactment. *Douglass v. Pike County*, 101 U. S. 677; *Rowan v. Runnels*, 5 How. 134; *Gelpcke v. Dubuque*, 1 Wall. 175; *Chicago v. Sheldon*, 9 Wall. 50; *Olcott v. Supervisors*, 16 Wall. 678; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574; *Anderson v. Santa Anna*, 116 U. S. 356; *Bostwick v. Brinkerhoff*, 106 U. S. 3; *Johnson v. Kieth*, 117 U. S. 199; *German Bank v. Franklin Co.* 128 U. S. 526, 539; *Knox Co. v. North National Bank*, 147 U. S. 91, 99; *Bacon v. Texas*, 163 U. S. 207, 221; *Wade v. Travis Co.* 174 U. S. 499, 509; *Loeb v. Columbia Township Trustees*, 179 U. S. 472.

The question here involved is not one of local law to be

settled by the decisions of the Minnesota court, but is one of general law to be determined by reference to all the authorities, and a consideration of the principles underlying the contract relations between the parties. *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368.

III.

Plaintiffs have not the Legal Capacity to Sue.

The second ground of demurrer relates to the capacity of the plaintiffs to maintain this action, and especially to the power of A. C. Finney as receiver to maintain the suit. It seems very clear upon principle and authority that he has not such capacity, and it is sufficient upon this point to refer to the recent decision of the Court of Appeals for the second circuit, decided May 16th, 1902, and reported in the advance sheets, 117 Fed. Rep. 220. There the plaintiff as receiver for the collection and enforcement of the liability of stockholders of a moneyed corporation organized under the laws of Minnesota, brought an action at law against the defendant as a stockholder of such corporation to recover the amount of the statutory liability. The constitution and statutes of Minnesota were set out in the complaint, and it was alleged that a judgment had been rendered in the Minnesota court against the resident stockholders and appointing a receiver to take the necessary steps against non-resident stockholders for the enforcement of their liability, and to that end to institute and prosecute all such actions or proceedings in foreign jurisdictions as might be necessary or appropriate. The proceedings in the Minnesota court were substantially the same as set forth in the complaint in this action and the authority conferred upon the receiver was of the same character. The only difference in the two suits is this: there the receiver alone sued the stockholder in an action at law, while here he has joined the creditors with him and sued in equity, but this distinction is immaterial. The Court of Appeals held that the receiver could not maintain the action. It is said (p. 224): "His rights, if

any, rest wholly upon the order and decree in the Rogers' case. Without regard to the nature of the claim asserted against the defendant, the plaintiff has no relation to that claim otherwise than through such order and decree. He is not the assignee of all or any of the creditors. He has no title to anything, so far as appears, except to his office of receiver. The order and decree, in terms, make him a mere agent of the Minneosta court. That court undertook to authorize him to sue non-residents in other jurisdictions; moneys collected to be 'held by him subject to the further order of this court (the Minnesota court) in the premises.' The Minnesota court thus attempted to send its agent to collect money by suit outside of its jurisdiction, and bring it back to be disposed of as it might direct. If it had had power to transfer the claim against the defendant to the plaintiff, and had in fact so transferred it, he could assert the title thus acquired and sue upon such claim here in accordance with the principles stated in *Association v. Rundle*, 103 U. S. 222. Apparently the court had no such power. Whether it had or not, it did not attempt to exercise it. It transferred nothing to the plaintiff. It merely appointed him its own agent to collect and hold subject to its order. He was made an arm of the court, with which the court attempted to reach outside of its territorial jurisdiction, and the attempt, it seems to us, was futile. The court could not reach beyond the limits of its jurisdiction through a receiver any more than it could through a marshall or a sheriff. The authority which it sought to give to the plaintiff became a dead letter when he passed beyond the boundaries of the state." The court cites in support of this doctrine *Booth v. Clark*, 17 How. 322, and quotes from that opinion.

It is further said (p. 225): "The court cannot take in execution property not within its legal jurisdiction. A creditors' bill, by which equitable assets can be reached, is a substitute for the common-law execution, and can be brought only in the same jurisdiction," citing *Tube Works Co. v. Ballou*, 146 U. S. 517. Numerous decisions are cited in the opinion in support of the proposition that an officer acting merely as an arm of the court cannot sue beyond its jurisdiction.

We may safely conclude therefore that the receiver as such had not the legal capacity to sue in the Wisconsin courts. The same rule had been adopted and applied in Wisconsin long before this suit was brought. *Filkins v. Nunnemacher*, 81 Wis. 91.

The objection that the receiver is made a co-plaintiff with the creditors when he has no interest in the cause of action may be taken by demurrer for the reason that no judgment could be given against him if the defendant should succeed. *Reed v. Sang*, 21 Wis. 678; *Pier v. Fond du Lac*, 53 Wis. 421; *Schiffer v. Eau Claire* 51 Wis. 385.

The other plaintiffs who were not judgment creditors of the insolvent corporation could not maintain this action in the Wisconsin courts. We do not question the rule that a general creditor may bring suit in behalf of himself and all others to enforce the liability of stockholders of an insolvent corporation in the courts of Wisconsin and to enforce the statutory liability created by the statutes of the state where all the stockholders are made parties. *Sleeper v. Goodwin*, 67 Wis. 577, sustains this practice but states that it is an exception to the general rule. Such a suit cannot be maintained against a single stockholder as the Supreme Court of Wisconsin has repeatedly decided as shown by the opinion in this case. (Trans. p. 45.)

A suit to reach equitable assets can only be maintained by a creditor who has recovered judgment and whose execution has been returned unsatisfied under the Wisconsin code and practice. *The North Hudson Mut. Bldg. & Loan Association v. Childs*, 86 Wis. 292; *Weber v. Weber*, 90 Wis. 467; *The Northwestern Iron Co. v. The Central Trust Co.* 90 Wis. 570. The same rule has been recognized and enforced by this court. *Case v. Beauregard*, 99 U. S. 119.

The Supreme Court of Wisconsin therefore might well have sustained this demurrer and dismissed the action upon the ground that the plaintiffs had not legal capacity to sue, a matter relating solely to the procedure in the state court and not involving a Federal right.

IV.

The Misjoinder of Causes of Action.

This suit as brought embraces two distinct causes of action, one in favor of the receiver against the defendant, and one on behalf of certain creditors against her; one against her individually and one against her as executrix and sole residuary legatee of Charles V. Guy, deceased. The suit by the creditors, if it could be maintained at all, would be in equity under the rules established by the courts of Minnesota and Wisconsin as appears by the authorities already referred to; the suit by the receiver in the Wisconsin court, if it could be maintained at all, would be a straight action at law. *Gilman v. Gross*, 97 Wis. 224, 229; *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747. It cannot be seriously contended that an action at law in favor of one party may be joined with a suit in equity in favor of other parties, to enforce liabilities against the defendant.

It is not permissible under the Wisconsin code to join in one complaint causes of action which do not affect all the parties thereto. Wis. Stats. 1898, § 2647.

Haxarden v. The Youghiogheny & Lehigh Coal Co., 111 Wis. 545 p. 552, condemns a complaint of similar character upon the ground of misjoinder. It is said (p. 552): "The statute provides that causes of action, in order to be united in one complaint 'must affect all the parties to the action.' Stats. 1898, sec. 2647. It is clear that this limitation would be violated if the two causes of action in this complaint are allowed to be united in one complaint. The first cause of action is a straight action at law for damages to the plaintiff alone. No one else has any interest in the judgment in that action whatever it be. But the second cause of action is a cause of action in favor of a large number of persons, constituting a class represented by the plaintiff. Potentially all of the class are parties. They are invited to become formal parties plaintiff, and presumably will accept the invitation. Thus the first cause of action affects but one party plaintiff, whereas the second cause of action affects numerous parties plaintiff. The

doctrine is frequently stated that the several causes of action for or against a person must affect him in the same capacity in order to make them capable of being joined. Pomeroy, Code Remedies (3d ed.) § 502.

"These considerations are conclusive to the effect that the general demurrer to the whole complaint on the ground of improper joinder should have been sustained."

The Wisconsin decisions are collected in a note to section 2647 and a further reference to them seems superfluous.

The order appointing the receiver authorizes him to bring suit against the "above named defendants" who are non-residents. (Trans. p. 31.) Attention has already been called to the fact that Charles V. Guy who had been dead for five years was named as a defendant, who held stock in the insolvent bank, and that Mary A. Guy as executrix or residuary legatee was not named or referred to in any manner in the proceeding. Under the terms of the order the receiver was not therefore authorized to sue her in her representative capacity or as residuary legatee. We do not here contend that the claim should have been filed against the estate of the deceased stockholder, but concede that under proper circumstances the defendant might have been made a party to a suit against all the stockholders either as executrix or residuary legatee. *Gianella v. Bigelow*, 96 Wis. 185; *Gager v. Paul*, 111 Wis. 638. The contention here is that she was not named as a stockholder in her representative capacity in the judgment entered by the Minnesota court, and consequently was not even constructively a party. *Gager v. Paul*, 111 Wis. 638, 646. If the demurrer had been sustained upon the ground that there was a misjoinder of causes of action, as it might well have been, then no Federal right would have been involved.

V.

The Bar of the Statute.

The complaint in this action is verified before a notary in Hennepin county, Minnesota, March 27, 1899 (Trans. p. 32), and in the usual course could not have been delivered

to the sheriff earlier than March 28, 1899. The date of its receipt and service does not appear in the transcript but can be ascertained by reference to the record. The complaint alleges that the total indebtedness of the insolvent bank on June 20, 1893, was the sum of $91,255.84, and of that amount $40,320.00 accrued prior to March 17, 1893, and the remainder prior to June 15, 1893. (Trans. p. 27.) Under the Minnesota statute a suit to enforce a liability created by statute must be brought within six years after the right of action accrues. Gen. Stats. 1878, p. 707. It is the same limitation as prescribed by the Wisconsin statute, subdivision 4, section 4222. "Accrued" is defined by Mr. Anderson in his Law Dictionary as "due and payable." This word is employed in the complaint and in the statute and will therefore have the same interpretation. It conclusively appears from the complaint that nearly one-half of the indebtedness represented by the plaintiffs accrued more than six years prior to the commencement of this action.

Under the Wisconsin Code it is a ground for demurrer "that the action was not commenced within the time limited by law." Wis. Stats. 1898, § 2649. In this case, however, it was not necessary for the bar of the statute to be pleaded by the defendant as it was incumbent upon the plaintiffs, suing as general creditors, to negative this defense and to show affirmatively that they were entitled to maintain the action.

The statutory liability of stockholders in manufacturing corporations, created by § 1769 Wis. Stats. 1898, in favor of laborers and other employees was under consideration in *Sleeper v. Goodwin*, 67 Wis. 577, 586, and it was there held that one creditor might sue on behalf of himself and all others similarly situated, but that it was incumbent upon the plaintiff to show that he belonged to the particular class for whose benefit the statute was enacted; and it was held in the same case that the six years statute of limitations applied to the right of action. The fact that a creditor who has not recovered judgment against the corporation may bring the suit, emphasizes the rule that he must show affirmatively in the complaint that he has a right to sue. It is to be remem-

bered that the liability created by statute in favor of creditors against stockholders is immediate and direct, and attaches when the debt is contracted under both the Minnesota and Wisconsin statutes. In *Sleeper v. Goodwin*, (p. 588) it is said: "This court at an early day determined that an action to enforce a statutory liability against the stockholders of a corporation should be an action in equity, in which the plaintiff should proceed on his own behalf, and also in the behalf of all other creditors having similar claims against all the stockholders who were liable to them under the law." As already stated some of these plaintiffs have not similar claims with the others, and in fact have no claim at all against this defendant as a stockholder. They show no right therefore to maintain this suit or to join in its prosecution. The rule here would be the same as in an action against an indorser upon a negotiable instrument where it is incumbent upon the plaintiff to allege that proper notice of dishonor had been given in order to fix the liability of the defendant. *Continental National Bank v. McGeogh*, 73 Wis. 332. In this case therefore, it was incumbent upon the plaintiffs to show that they had a subsisting, valid claim against the defendant growing out of the liability created by the statute of Minnesota and their right to jointly maintain the suit to recover the amount thereof.

The complaint in such an action is strictly construed, and it is fatally defective if it fails to state the facts which lay the foundation for enforcing the liability and the plaintiffs' right to maintain the action. 3 Thompson on Corporations §§ 4337–4338; *Germania Iron Co. v. King*, 94 Wis. 439; *Seaman v. Goodnow*, 20 Wis. 27.

Without the material averments above indicated the complaint failed to state a cause of action, and the demurrer might well have been sustained upon that ground.

Counsel for plaintiffs insists (Brief, p. 25) that the right of action is not barred by the statute of limitations "for the commencement of proceedings tolled the statute both as to the bank and the stockholders." He cites in support of the proposition two decisions of the supreme court of Minnesota, the first decided July 5, 1901, and the second at a later date, but they are entitled to no consideration.

These decisions were not pleaded and the presumption is that the law of Minnesota is the same as in Wisconsin. *Rape v. Heaton*, 9 Wis. 301; *Walsh v. Dart*, 12 Wis. 635; *Osborne v. Blackburn*, 78 Wis. 209; *St. Sure v. Lindsfelt*, 82 Wis. 346, 531; *MacCarthy v. Whitcomb*, 110 Wis. 113, 123.

As already stated the commencement of proceedings against the corporation in Wisconsin did not toll the statute as to the stockholders. *Gager v. Paul*, 111 Wis. 638, 647; *Levy v. Wilcox*, 96 Wis. 127.

Mr. Thompson in his Commentaries on Corporations, §3079, states that where the liability of the stockholder to the creditor is immediate and direct that the statute of limitations begins to run in favor of the stockholder from the time when the debt was contracted, but this is not so where the statute requires a creditor to exhaust his remedy against the corporation before he can sue the stockholder.

Olson v. Cook, 57 Minn. 552, 59 N. W. 635, is one of the cases brought to the attention of the Supreme Court of Wisconsin in the plaintiffs' complaint. (Trans. p. 23.) The court there holds that the creditors of an insolvent bank may bring an action to enforce the statutory liability upon its failure immediately and without awaiting the result of the insolvency proceedings to ascertain the amount to be collected. It is also alleged in the complaint that this liability is direct to the creditors; that it is not necessary for the creditors to procure a judgment against the bank before commencing a suit to enforce the stockholders' liability; that liability of stockholders is a primary and principal one and not as surety for the corporation. (Trans. p. 25.)

An examination of the cases cited by counsel for plaintiffs in 84 Minnesota shows that the court there sustained assessments made upon stockholders under the provisions of Chapter 272, Laws of 1899, approved April 18, 1899, sometime after this action was commenced, and which expressly provides that it shall not apply to pending actions. This law is entitled "An act to provide for the better enforcement of the liability of stockholders of corporations." It provides that when an assignment has been made by the corporation, or a receiver appointed, in an action against it, the court may, upon the notice therein pre-

scribed, proceed to levy an assessment upon the stockholders. The decisions based upon this statute do not undertake to overrule former decisions of the court. It is worthy of notice that this statute authorizes a receiver to be appointed by the court to bring actions in the courts of any state or country to enforce the assessment made upon the stockholders, indicating that in the opinion of the legislature at least the statutes previously in force would not support an action in a foreign jurisdiction.

VI.

The Complaint does not State a Cause of Action.

Much that has been said under the last four heads of this brief relates as well to the sufficiency of the complaint as to the questions there under consideration. The opinion of the Wisconsin Supreme Court in this case (Trans. p. 45) has treated this subject so ably and so fully that further argument is hardly necessary. We shall here refer only to one point not there considered. The complaint refers to the order of the court appointing the receiver, and a copy is annexed thereto and made a part thereof. This order authorizes the receiver to compromise and settle claims against stockholders "if he shall deem it advisable and to the best interests of the plaintiff and the creditors who have joined as parties plaintiffs in this action." (Trans. p. 31.) It is further alleged that the receiver had compromised and settled the liabilities of certain stockholders therein named "who were non-residents of the state of Minnesota and not within the jurisdiction of said court and against whom no judgment was entered." (Trans. p. 29.) It is further averred that composition settlements had been made with certain stockholders who were named as defendants in the suit. (Trans. p. 28.) It therefore appears that there were stockholders of the bank who were not parties to the suit in the Minnesota court, where the judgment was entered, and that they had been released, thereby cutting off the right of contribution of this defendant should the liability against her be enforced.

This proceeding is of a much more flagrant character

than that condemned by the court in *Great Western Tel. Co. v. Burnham*, 79 Wis. 47. There the circuit court for Cook county, Illinois, had levied an assessment upon the stockholders of the corporation for their unpaid subscriptions without regard to the amount levied and collected under a prior assessment. The fund realized upon the first assessment was not sufficient to pay all the debts. Some years afterwards, the court directed a second assessment to be made uniformly upon all the stockholders, which, for the reason stated, was unequal in its character. A suit to enforce the second assessment against a stockholder in Wisconsin was commenced in the circuit court for Milwaukee county. The complaint contained a full statement of the facts and it was demurred to and the demurrer was finally sustained by the supreme court. It there affirmatively appeared upon the face of the complaint that some of the stockholders had paid forty per cent. of their subscriptions and some only two per cent., and that the assessment sued upon was a horizontal assessment of thirty-five per cent. upon all. This was held to be conclusively unequal and unfair, and that the plaintiff had by his own allegations impeached and discredited the decree of the court notwithstanding the fact that the assessment was made by a court of competent jurisdiction. The decree of the Minnesota court is less worthy of credit, for instead of making the settlement it delegated the power to the receiver to make such compromises as to him should seem advisable. The Illinois court had not attempted to discharge or release the stockholders who had been favored but they were still subject to suit for contribution by any stockholder who might pay more than his share. Here the Minnesota court has discharged the stockholders with whom settlements had been made, and debarred the defendant from enforcing any claim for contribution in case she is required to pay the full amount of the liability. In answer to this objection it may be urged that it appears from the complaint that the indebtedness represented by the plaintiffs exceeds the entire amount of the statutory liabilities, but this entirely ignores the bar of the statute of limitations to a large portion of the alleged indebtedness. The court can indulge no presumption in support of

this complaint to the effect, that if to the claims released by composition are added those which have been barred by the statute as to the defendant, the amount remaining will equal the liability of all the stockholders. The extent of the liability of this defendant, and the right of the plaintiffs to enforce it, lies at the very threshold of this suit; and if the complaint does not by proper averment set forth a valid, subsisting claim against the defendant which she ought in equity to pay ratably with the other stockholders, and the enforcement of which will not prejudice her rights, it fails to state a cause of action. If the procedure adopted will not enable the court to ascertain the amount of subsisting claims and to enforce payment upon equitable principles and preserve the rights of the defendant as against the other stockholders, then the remedy provided is inadequate and cannot be enforced in a foreign jurisdiction under the authorities already referred to.

Counsel for plaintiffs makes the contention that the provision of the constitution of Minnesota, which is referred to on page 7 of his brief, imposing individual liability upon stockholders for debts of the bank, is self-executing and cites *Whitman v. Bank*, 176 U. S. 559, in support of the proposition. A sufficient answer to this argument, put forth here for the first time, is that the constitution of Minnesota is not pleaded and could not therefore be considered by the Wisconsin court as establishing the right or regulating the procedure. The plaintiffs in their complaint set out the provisions of the general statutes of Minnesota of 1878 and of 1894 as creating the liability and making provision for its enforcement. (Trans. pp. 22, 23.) Among the cases there cited as bearing upon the right and the remedy is *Allen v. Walsh*, 25 Minn. 543, decided in 1879, and the statutes as there construed determined the right of the creditors and stockholders of this corporation as has already been stated.

Whitman v. Oxford National Bank, 176 U. S. 559, does not support the contention of counsel that the provision of the constitution as before the court is self-executing in so far as the procedure is concerned. The court there had under consideration the Kansas constitution and statutes

and it was held that the constitution is self-executing in so far as it makes provision for the liability of the stockholder. (p. 562.) It is further said (p. 563): "But this constitutional provision does not stand alone. The legislature of Kansas has acted on the subject matter, and the constitution and statutes are to be taken together, as making one body of law; and it serves no good purpose to inquire what rights and remedies a creditor of a corporation might have or what liabilities would rest upon a stockholder if either constitution or statutes stood alone and unaided by the other." While the constitution therefore may create the liability the procedure for its enforcement must be governed by the statutes of the state.

In *Allen v. Walsh*, 25 Minn. 543, the supreme court of Minnesota declared that the only remedy for enforcing the statutory liability was that provided by the general statutes of the state there referred to which "contemplated a single action in which all persons having or claiming any interest in the subject matter of the action shall be joined or properly represented, and the respective rights, equities and liabilities finally settled and determined." (p. 556.)

It is respectfully submitted that the writ of error should be dismissed, or the judgment of the Supreme Court of Wisconsin affirmed.

Dated January 5, 1903.

R. M. BASHFORD,

Attorney for Defendant in Error.

MADISON, WISCONSIN.